

RENDERED: NOVEMBER 22, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001857-MR

BECKY HARILSON, IN HER OFFICIAL CAPACITY
AS ACTING CO-DIRECTOR OF THE KENTUCKY
LEGISLATIVE RESEARCH COMMISSION; DAVID
FLOYD, IN HIS OFFICIAL CAPACITY AS ACTING
CO-DIRECTOR OF THE KENTUCKY LEGISLATIVE
RESEARCH COMMISSION; AND DAVID BYERMAN,
IN HIS OFFICIAL CAPACITY AS FORMER DIRECTOR
OF THE KENTUCKY LEGISLATIVE RESEARCH
COMMISSION

APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 18-CI-00512

LEXINGTON H-L SERVICES, INC., D/B/A LEXINGTON
HERALD-LEADER

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: KRAMER, MAZE AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Becky Harilson, *et al.*, (hereinafter “Appellants”) appeal from an order of the Franklin Circuit Court denying their motion to dismiss the action of Lexington H-L Services, Inc., d/b/a Lexington Herald-Leader (“Appellee”) for public records. The requested records related to a complaint by a Legislative Research Commission (“LRC”) staff member against a member of the Kentucky General Assembly. Appellants argue that the Franklin Circuit Court improperly failed to conclude that legislative immunity applies to shield disclosure of the requested records, and that legislative immunity was not waived. For the reasons addressed below, we find no error and AFFIRM the order on appeal.

Facts and Procedural History

The facts are not in controversy. On March 9, 2018, Appellee, through its employee Daniel Descrochers, sent an open records request to the Records Custodian of the LRC. Descrochers sought records of a complaint made by an LRC staffer against Rep. Jim Stewart III on February 5, 2015, along with records of any meetings held with Stewart on February 9, 2015, and any agreement stating that Stewart was to have no contact with the staffer.

On March 14, 2018, LRC General Counsel Greg Woosley denied the open records request based on Kentucky Revised Statute (“KRS”) 61.878(1)(a), (h), (i) and (j), and Section 43 of the Kentucky Constitution. Specifically, the LRC claimed that the records were not subject to release because they would constitute

an unwarranted invasion of privacy, would constitute a premature disclosure of an internal investigation, and would improperly disclose preliminary drafts, notes and recommendations. About two weeks later, Appellee sent a second request to Woosley stating that in response to the issue of invasion of privacy, it would accept redacted documents concealing the name of the staffer. The LRC did not respond to this request.

Appellee sent another letter to the LRC on April 12, 2018, asking it to review the denial of the first request and lack of response to the second request. After no response was received, Appellee filed a complaint on May 14, 2019, with the Franklin Circuit Court pursuant to KRS 7.119(3).¹ On that same day, the LRC issued a decision affirming then-Director David Byerman's decision denying disclosure of the requested records.

The matter proceeded in Franklin Circuit Court, whereupon Appellant Byerman filed a motion to dismiss. Byerman asserted the defense of legislative immunity under Section 43 of the Kentucky Constitution and the common law, as well as additional bases for the dismissal. Byerman argued that Appellee's complaint alleged that any requested records were gathered during a session of the

¹ The complaint was filed against LRC Director David Byerman, who subsequently was replaced by Co-Directors Becky Harilson and David Floyd. Appellants' motion to substitute Harilson and Floyd for Byerman as party defendants was not ruled upon before this appeal commenced. As a result, all three individuals are listed as Appellants on the Notice of Appeal.

General Assembly and in furtherance of a legislative branch investigation into a legislator's conduct pursuant to Section 39 of the Kentucky Constitution. Further, Byerman maintained that KRS 7.119(3) did not operate as an express waiver of legislative immunity.

A hearing on the motion was conducted on August 22, 2018. On November 13, 2018, the Franklin Circuit Court entered an order denying the motion to dismiss. Judge Shepherd determined that the requested records did not fall within the narrowly defined legislative immunity afforded the General Assembly during the process of considering, passing or rejecting legislation. The circuit court also ruled that though legislative immunity might shield the LRC from judicial scrutiny, the General Assembly expressly waived its immunity by enacting KRS 7.119(3), KRS 61.880 and KRS 61.882. This appeal followed.

Arguments and Analysis

Appellants now argue that the Franklin Circuit Court committed reversible error in failing to conclude that: 1) legislative immunity applies to shield disclosure of the requested records, and 2) legislative immunity was not waived as to the requested records. Appellants contend that the LRC and its staff are functionally equivalent to the General Assembly members for purposes of legislative immunity, that legislative immunity applies to investigations into General Assembly member conduct, and that the requested records were related to

a constitutionally provided investigation into the governance of member conduct and are not subject to compulsory disclosure. As to their claim that legislative immunity was not waived as to the requested records, Appellants contend that Section 43 of the Kentucky Constitution is an individual grant of immunity, that the relevant statutory sections contain no language related to waiver, and that the history of the General Assembly's enactments demonstrate a reassertion of legislative immunity and independence over legislative records. In sum, Appellants request that we reverse the ruling of the Franklin Circuit Court as to the applicability and waiver of legislative immunity, and remand the matter for entry of an order dismissing Appellee's complaint.

The Open Records Act is set out at KRS 61.870 *et seq.*, and exists to further the policy that free and open examination of public records is in the public interest. It provides that the limited exceptions to the Act shall be strictly construed even though such examination may cause embarrassment or inconvenience to public officials or others. KRS 61.871. Requests for documents in the custody of the LRC or the General Assembly shall be made to the Director of the LRC, and an adverse decision by the Director can be appealed to the LRC. KRS 7.119(3). If the LRC does not issue its decision within 30 days of submission, the Director's decision may be appealed to the Franklin Circuit Court

within 60 days of its issuance. *Id.* At all relevant times, Appellant Byerman was Director of the LRC.

The concept of legislative immunity derives from provisions of the constitutions of the United States and the Commonwealth stating that legislators shall be privileged for any speech or debate in either House. *See* U.S. Const. art I, § 6, cl. 1, and Ky. Const. § 43. The protections of legislative immunity are well-established and are inculcated into the common law of the United States and the Commonwealth. *Baker v. Fletcher*, 204 S.W.3d 589, 593 (Ky. 2006).

Appellants assert that Appellee's records request is precluded by legislative immunity because the LRC and its staff are the functional equivalent of the General Assembly for purposes of legislative immunity. In support of this argument, Appellants direct our attention to *Gravel v. United States*, 408 U.S. 606, 616, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972) (citation omitted), in which the United States Supreme Court opined that "for the purpose of construing the privilege a Member and his aide are to be 'treated as one[.]'" This holding was grounded on the realization that in view of the complexities of the modern legislative process, it is virtually impossible for legislative members to perform their tasks without the support of aides and assistants. *Id.* As such, aides and assistants were found to benefit from the shield of the legislative immunity which also protected legislators.

In considering this issue, the Franklin Circuit Court distinguished between legislative action, to which it found immunity applied, and non-legislative action, which it determined was not shielded by legislative immunity. The court gave only cursory consideration to this issue, however, upon concluding that even if, *arguendo*, legislative immunity operated to shield legislative staffers from requests unrelated to legislation, the General Assembly nonetheless expressly waived legislative immunity as to open records requests submitted to the LRC.

This conclusion is supported by the record and the law. The General Assembly expressly provided for a right to judicial review of LRC denials of open records requests. *See also Harilson v. Shepherd*, ___ S.W.3d ___, 2019 WL 4689131, at *9 (Ky. 2019) (made final on October 22, 2019) (reaffirming the Franklin Circuit Court's proper exercise of subject matter jurisdiction over open records requests, including those involving the LRC). By establishing a mechanism for seeking open records and providing for judicial review of adverse decisions of the Director and the LRC, the General Assembly waived legislative immunity under the facts before us. As such, the circuit court determined that even if legislative immunity would apply to a legislative staffer on non-legislative matters, such immunity was statutorily waived. We find no error in this conclusion, as there is no question but that the Legislature created an avenue of appeal from adverse decisions of the Director and the LRC. Further, and as noted

by the Franklin Circuit Court, Appellants' motion was on the narrow issue of jurisdiction and did not address any substantive issues. The order on appeal made no determination as to whether there are legitimate grounds for withholding the requested records from public disclosure.

When considering a Kentucky Rule of Civil Procedure ("CR") 12.02 motion to dismiss, the pleadings should be "construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true." *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. App. 1987) (citing *Ewell v. Central City*, 340 S.W.2d 479 (Ky. 1960)). On appeal, we must also take the allegations as true. *James v. Wilson*, 95 S.W.3d 875, 889 (Ky. App. 2002). A trial court should not grant a motion to dismiss "unless it appears the [plaintiff] would not be entitled to relief under any set of facts which could be proved in support of his claim." *Mims v. Western-Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. App. 2007) (quoting *James*, 95 S.W.3d at 883-84). Legislative immunity as to the Director of the LRC, if any, was expressly waived by the Legislature and does not, by itself, form a basis for dismissing the action before us. The Franklin Circuit Court did not err.

Conclusion

For the foregoing reasons, we AFFIRM the order denying the motion to dismiss entered by the Franklin Circuit Court.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
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Legislative Research Commission
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BRIEF FOR APPELLEE:

Thomas W. Miller
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ORAL ARGUMENT FOR
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